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No.:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Carmen Perillo, Stephen Dautel, Gerald Hardy,
William Brown, J. Elaine Broom,
and Joann Kotchkowski,
Petitioners

v.

AT&T Corp.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Robert J. Winicki
(Counsel of Record)
Winicki Law Firm
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955

Barbara Slott Pegg
Barbara Slott Pegg, P.A.
13000 Sawgrass Village
Circle, Suite 11
Ponte Vedra, Fl. 32082
(904) 285-8100

Attorneys for Petitioners

25 pp

QUESTION PRESENTED FOR REVIEW

Is Local Rule 4.04(e) of the United States District Court for the Middle District of Florida, which prohibits all communications by named representative class plaintiffs and their counsel relating to the action with potential or actual class members, a prior restraint on speech and assembly in facial violation of the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The petitioners are Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom and Joann Kotchkowski.

The respondent is AT&T Corp. ("AT&T"), which is a publicly traded corporation that is a parent to a number of subsidiaries, some or all of which are wholly owned.

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OPINIONS BELOW

On September 22, 1998, the United States Court of Appeals for the Eleventh Circuit denied petitioners' petition for a writ of prohibition to the United States District Court for the Middle District of Florida in an unpublished order. A copy of the order is contained in the Appendix (App. A.).

On August 12, 1998, the United States District Court for the Middle District of Florida denied petitioners' motion to declare Local Rule 4.04(e) in facial violation of the right to speech and assembly and right to access to courts, without prejudice to their right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification, in an unpublished order. A copy of the order is contained in the Appendix (App. B.).

STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 2101(e) of Title 28 of the United States Code to review by certiorari the denial of petitioners' petition for writ of prohibition by the United States Court of Appeals for the Eleventh Circuit on September 22, 1998.

CONSTITUTIONAL PROVISIONS AND RULES

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacefully to

assemble, and to petition the Government for a redress of grievances."

Local Rule 4.04(e) of the United States District Court for the Middle District of Florida provides: "In every case sought to be maintained by any party as a class action, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member, not a formal party to the case, without approval by order of the Court. The communications forbidden by this rule include, but are not limited to, (1) solicitations directly or indirectly of legal representation of actual or potential class members who are not formal parties to the case; (2) solicitations of fees and expenses, or agreements to pay fees or expenses, from actual or potential class members who are not formal parties to the case; and (3) solicitations of requests by class members to opt out in class actions under Rule 23(b)(3), Fed. R. Civ. P."

STATEMENT OF THE CASE

On June 16, 1996, a class action complaint was filed in the United States District Court for the Middle District of Florida by the above-named six petitioners, plaintiffs below, on behalf of individuals who were salaried management employees for a number of years of: (1) AT&T Solutions Customer Care, Inc. ("AT&T Solutions Customer Care"), a subsidiary of AT&T Corp. ("AT&T"), prior to its acquisition by MATRIXX Marketing, Inc. ("Matrixx"): and (2) AT&T Universal Card Services, Inc., a subsidiary of AT&T, ("Universal Card Services"), prior to its acquisition by Citibank, N.A.. The case being heard in the district court below involves whether AT&T violated ERISA by purposely

interfering with the petitioners' attainment of ERISA benefits including those offered when AT&T adopted an early retirement program called the Voluntary Retirement Incentive Program ("VRIP"), commonly known as the Armstrong Plan. The class sought to be represented are all former managers of two former AT&T subsidiaries, AT&T Solutions Customer Care and Universal Card Services, with whose attainment of ERISA benefits AT&T purposely interfered.

The basis of jurisdiction in the United States District Court for the Middle District of Florida was federal question under section 1331 of Title 28 of the United States Code.

The Middle District of Florida's Local Rule 4.04(e) prohibits communications by the six named plaintiffs and their counsel with any actual or potential class members concerning the litigation.

The six named plaintiffs and their counsel have been prohibited from communicating with other former managers of AT&T Solutions Customer Care and Universal Card Services since the date this action was filed because of Local Rule 4.04(e). On June 29, 1998, the named plaintiffs filed an emergency motion with the district court, Judge Harvey Schlesinger, to declare Local Rule 4.04(e) in violation of the rights to speech and assembly under the First Amendment of the United States Constitution.

In addition to the six named plaintiffs, many other former AT&T Solutions and Universal Card Services managers have made contributions to defray the legal costs of performing the necessary research prior to bringing the district court litigation. All of these former managers are potential class members. In addition, many had indicated that they desired to continue to financially support the

litigation through contributions necessary to pay ongoing costs. They also desire to be kept informed of the progress of the case and to provide relevant information to petitioners' counsel. For various reasons, many of the former managers of AT&T Solutions Customer Care and Universal Card Services did not desire to be named plaintiffs, but still desired to remain involved. Yet, all communications ceased as of the date the complaint was filed. Absolutely no justification for this arbitrary ban on all communications has been given by the district court judge, the United States Court for the Middle District of Florida, the United States Court of Appeals for the Eleventh Circuit or by AT&T.

Although the petitioners, named plaintiffs below, and their counsel were able to communicate with the other former managers immediately prior to the complaint being filed, after the complaint was filed Local Rule 4.04(e) prohibited communication between the named plaintiffs and their counsel; and the former managers who are not named plaintiffs. For example, because of Local Rule 4.04(e) the former managers cannot be told that the lawsuit was filed, despite their contribution to the filing fee. Nor could the former managers be told that a petition was being filed with the United States Court of Appeals for the Eleventh Circuit to declare the Local Rule 4.04(e) unconstitutional, despite the fact that their contributions are paying part of the filing fee. The same is true for this petition to the United States Supreme Court.

The complete prohibition of communication between the named plaintiffs and their counsel with the former managers affects other critical events of this lawsuit. In particular, Matrixx has been communicating with its managerial employees formerly employed with AT&T Solutions Customer Care about releasing their bridging rights under the Mandatory Portability Agreement, which applies to

AT&T and Matrixx, and about a reduction in force. Certain of the named plaintiffs and other management employees formerly employed with AT&T Solutions Customer Care have been presented with a proposal to waive their rights under the Mandatory Portability Agreement, which provides for mutual recognition of service credit and transfer of benefit obligations for certain employees who leave one "Interchange Company" and are later employed by another "Interchange Company." Interchange Companies include AT&T, the RBOCs (i.e., BellSouth) and Cincinnati Bell, Inc., the parent of Matrixx. The proposed release included, in part, the following language:

> Any and all claims for benefits arising under the Employment Retirement Income Safety [Security] Act ("ERISA"), as amended from time to time, of any sort relating to portability of service with my former, current or future portability employer(s) [or Interchange Companies and certain of their subsidiaries].

Despite this critical event affecting the former managers, including events with deadlines that may impact their rights under this lawsuit, the named plaintiffs and their counsel cannot respond, advise or communicate with the former managers because they are potential class members. All such communications are barred by Local Rule 4.04(e).

Counsel in this case, as well as in other class actions pending in the Middle District of Florida, are frequently questioned as to why the counsel in Florida state courts and other federal district courts, including the Northern and Southern Districts of Florida, are able to freely communicate relevant class information with actual and potential class members, including over the internet, utilize e-mail and toll-

free numbers, but counsel in the Middle District of Florida cannot even tell an individual, who paid part of the filing fee, that the complaint was filed. The answer given is because the Middle District of Florida has completely banned such communications and that motions seeking to lift the ban are routinely denied, as was true in this case.

On June 29, 1998, petitioners filed a Motion to Declare Local Rule 4.04(e) in Facial Violation of the Right to Speech and Assembly. The motion was denied, without prejudice to Plaintiffs' right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification, by order filed August 12, 1998. The order of denial was one sentence on this important constitutional matter involving a prior restraint on speech and assembly. The order read in full as follows:

> Plaintiffs' Motion to Declare Local rule 4.04(e) in Facial Violation of the Right to Speech and Assembly and Right to Access to Courts (Doc. No. 4 filed June 29, 1998) is DENIED, without prejudice to Plaintiffs' right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification.

On September 7, 1998, petitioners served a petition for writ of prohibition in the United States Court of Appeals for the Eleventh Circuit. On September 22, 1998, the Eleventh Circuit issued an order that read in full: "Petitioners' petition for writ of prohibition is DENIED."

REASONS TO GRANT THE WRIT OF CERTIORARI

A. Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court reviewed the question of whether an order limiting communications with potential class members was an unconstitutional prior restraint on expression entitled to First Amendment protection. The Court held that the order in question was an abuse of the discretion of the district court under the Federal Rules of Civil Procedure for the following reasons: "(a) The order is inconsistent with the general policies embodied in Federal Rule of Civil Procedure 23, which governs class actions in federal district courts . . . ; (b) . . . [S]uch an order should be based on a clear record and specific findings reflecting a weighing of the need for a limitation and the potential interference with the parties' rights . . . ; (c) . . . The fact that the order involved serious restraints on expression, at a minimum, counsels caution on the District Court's part in drafting the order and attention to whether the restraint was justified by a likelihood of serious abuses . . . ; (d) The mere possibility of abuses in class-action litigation does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Federal Rules." *Id.* at 90.

The Court acknowledged that although class actions may present "opportunities for abuse as well as problems for courts and counsel in the management of cases, . . . a district court has both the duty and the broad authority to exercise control over a class action to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the

relevant provisions of the Federal Rules. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Moreover, . . . exercises of this discretion are subject to appellate review. (cite omitted) *see Eisen; Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)." *Id.* at 100.

Furthermore, the Court rejected the district court's imposition of sweeping limitations on communications by named plaintiffs and their counsel to prospective class members and required that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. (footnote omitted) *Id.* at 101. The Court reasoned: "Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing -- identifying the potential abuses being addressed -- *should result in a carefully drawn order that limits speech as little as possible*, consistent with the rights of the parties under the circumstances." *Id.* at 101-02 (emphasis added) (footnote omitted).

> [T]o the extent that the district court is empowered ... to restrict certain communications in order to prevent frustration of the policies of Rule 23, *it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened.* Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit

> consideration to the narrowest possible relief which would protect the respective parties.

Gulf Oil Co. v. Bernard, 452 U.S. at 102 (emphasis added).

No one, including the district court judge, the Middle District of Florida and AT&T, ever attempted to make such a showing. Instead, Local Rule 4.04(e), in direct contravention to the emphasized holding of this Court, imposes a complete ban without a motion or showing by anyone. AT&T's response to the petitioners' emergency motion argued that motion should be denied because the plaintiffs "failed to demonstrate a compelling need for communications with the class." AT&T and the Middle District of Florida, with the acquiescence of the Eleventh Circuit, have shifted the burden to petitioners to demonstrate a "compelling need" for communication, exactly the opposite of the burden imposed by the Supreme Court in *Gulf Oil Co. v. Bernard*. The district court's ruling is no better. A one-line order continuing the complete prohibition does nothing to meet the mandate of the Court for "*a specific record showing by the moving party of the particular abuses by which it is threatened*."

B. The Eleventh Circuit's Most Recent Application of Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)

In the lower court decision of the en banc United States Court of Appeals for the Fifth Circuit in *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (1980) (en banc), *aff'd on other grounds*, 452 U.S. 89 (1981), the pre-split Fifth Circuit had decided the constitutionality under the First Amendment of the district court's temporary order, which broadly restricted communication by parties and their counsel with actual and

potential class members. The temporary order in *Bernard v. Gulf Oil Co.* limited communication by parties and their counsel with actual or potential class members of a racial discrimination lawsuit. Despite the order being imposed on parties to a class action governed by Rule 23 of the Federal Rules of Civil Procedure, the Fifth Circuit held that the order entered in the case was an unconstitutional prior restraint. The court reasoned that "[a] prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota*, [283 U.S. 697 (1931)]. The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, Foreward: Even When a Nation is at War, 85 Harv.L.Rev. 3, 33 (1971)." *Bernard v. Gulf Oil Co.*, 619 F.2d at 467-68.

There was an exception to the order at issue in the *Bernard* case that permitted communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. Despite the exception, the appellate court remarked unfavorably to the fact that in *Bernard's* order the present client was forbidden to talk to the prospective client. *See id.* at 470, n. 16.

Yet, the exception provided in the *Bernard* order was less restrictive that what is prohibited by the Local Rule 4.04(e), which unjustly forbids counsel from talking to former managers who already have contributed to the lawsuit and/or attended initial meetings with counsel and named plaintiffs, who have established an attorney/client relationship.

The en banc Fifth Circuit rejected any exception under the Federal Rules of Civil Procedure governing class actions, for "permitting prior restraints merely because it arises in the general context of the administration of justice

and the particular context of Rule 23." *Id.* at 474. The court continued:

> The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contacts. Subdivision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further 'the fair and efficient conduct of the action . . . .' [T]he court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger*, 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen*, -- U.S. --, 100 S.Ct. 1003, 62 L.Ed.2d 745 (1978).

Id. at 474.

There has been only one subsequent case decided in the Eleventh Circuit concerning a similar prohibition on communication to prospective class members. Last year the Eleventh Circuit in a case that is conspicuous for the absence of any discussion of the constitutionality of Local Rule 4.04(e), Judge Tjoflat set forth a test for the district courts below to pass before issuing orders authorizing class

communications prior to class certification. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). (Judge Tjoflat wrote the special concurrence in the en banc *Bernard* decision in which he opined that the order should be invalidated on non-constitutional grounds because it was inadequately supported by findings of facts, a position that for the most part was approved of by the Court in its *Bernard* decision.) *Jackson* involved a class action lawsuit in which defendants filed a writ of mandamus petition to vacate an order allowing for mass mailing and 800 number communications with potential class members.

The test set forth by Judge Tjoflat is as follows:

> An order authorizing class communications prior to class certification is likely to be an abuse of discretion when (1) the communication authorized by the order is widespread and clearly injurious and (2) a certification decision is not imminent or it is unlikely that a class will in fact be certified. In such circumstances, the danger of abuse that always attends class communications--the possibility that plaintiffs might use widespread publication of their claims, disguised as class communications, to coerce defendants into settlement--is not outweighed by any need for immediate communications.

Id. at 1004.

This test of an individual communication order misses the constitutional issue of the pre-existing blanket prohibition imposed by Local Rule 4.04(e). There is no order authorizing class communication. Just the opposite is true; the Local Rule 4.04(e) prohibits all such communications.

Moreover, in *Jackson v. Motel 6 Multipurpose, Inc.*, many of the potential class members referred to were current employees of defendant, which could involve ethical implications. In this case, however, the former managers are by definition former employees of former subsidiaries of the defendant, AT&T. Communication by counsel for petitioners with former employees is expressly permitted by the Florida Code of Professional Conduct. *H.B.A. Management, Inc. v. Estate of Schwartz By and Through Schwartz*, 693 So.2d 541 (Fla. 1997). Counsel for AT&T would be in violation of Florida Rule of Professional Conduct 4-3.4(f), if they were to advise former employees not to communicate with petitioners' counsel.

To the extent Judge Tjoflat based his conclusory statement without factual findings in *Jackson* that "the advertisements and mass mailings allowed by the order at issue in the instant petition are nationwide in scope and are *surely causing serious and irreparable harm to Motel 6's reputation and to its relationship with its employees*" upon a perception of the intelligence of the audience being able to understand truthful communications, then *Jackson* is wrongly decided. First Amendment rights cannot be abridged because of a trial court's perception of the audience, which were primarily non-white receptionists, chambermaids and janitors who were employed by Motel 6 in *Jackson*. The same conclusion may be drawn by the publication of Lincoln's Emancipation Proclamation with respect to its impact on slavery, but that is not an injury that justifies a prior restraint on freedom of speech. Speeches at labor rallies by Eugene Debs may have disrupted employer-employee relations and publication of the Pentagon Papers may have affected morale in the armed forces. Neither justified a prior restraint on speech or assembly. Almost every lawsuit against a corporation is negative publicity but negative publicity can

never justify a prior blanket restraint on speech or publicity by the parties and their counsel in a civil matter.

Article III courts are open to the public and any restriction on publicity, especially in a civil case, should be as narrowly tailored as is judicially possible, with the court explaining the need for each aspect of the restraint. Article III courts were created to protect First Amendment rights, not violate them.

C. Local Rule 4.04(e) and its Most Recent Application by the Eleventh Circuit Conflicts with Decisions of the United States Courts of Appeals for the Sixth and Eighth Circuits

In addition to the Fifth and the Eleventh Circuits, the United States Court of Appeals for the Sixth Circuit has ruled upon orders restricting communications with prospective class members. The Sixth Circuit in *Williams v. United States District Court*, 658 F.2d 430 (6th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981), following the Supreme Court's ruling in *Gulf Oil Co. v. Bernard*, issued a writ of mandamus directing the district court below to vacate an order restricting communications between parties and their counsel issued pursuant to a local district court rule. In *Williams v. United States District Court*, a case involving a race discrimination class action suit, the Sixth Circuit stated:

> A district court's rule-making authority is derived from Fed.R.Civ.Pro. 83 and 28 U.S.C. § 2071. Rule 83 and Section 2071 prohibit a district court from issuing local rules which are inconsistent with the Federal Rules of Civil Procedure, Acts of Congress and rules of practice and procedure prescribed by the

> Supreme Court. A local rule is inconsistent with federal rules and statutes of it alters those aspects of the litigation, thereby frustrating federal policies. *Colgrove v. Battin*, 413 U.S. 149, 163- 64 and n. 23, 93 S.Ct. 2448, 2456, and n. 23, 37 L.Ed.2d 522 (1973); *Miner v. Atlass*, 363 U.S. 641, 649- 50, 80 S.Ct. 1300, 1305, 4 L.Ed.2d 1462 (1960). (footnotes omitted)

Williams, at 435-36.

The United States Court of Appeals for the Eighth Circuit in *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), an age discrimination class action, held that the district court improperly ordered prospective class members to be notified of their right to join in the action. In *McKenna*, the appellate court tested the federal administrative ADEA rule, section 216(b) and reasoned:

> A notice prepared and sent by an attorney to prospective class members serves primarily to procure remunerative employment. Accordingly, we analyze the attorney's right to send the notice as commercial speech. A four-part test is applied: first, is the communication misleading or does it concern unlawful activity; second, if there a substantial interest in prohibiting the speech; third, does prohibition directly advance these interests; and fourth, is the regulation no broader than necessary to further the asserted interests. (citations omitted)

Id., at 1214-15.

The *McKenna* court likened notices being sent to prospective class members as a "direct-mail solicitation of particular plaintiffs for a particular lawsuit closely approach[ing] in-person solicitation. *See Baker v. Michie Co.*, 93 F.R.D. 494, 496 (W.D.Va.1982)." *Id.* at 1216. However, in his concurring opinion, Judge McMillian, wrote: "This court's holding is specifically directed to plaintiff's counsel, and the analysis focuses upon the danger that counsel's sending notice to potential class members would constitute improper solicitation. However, I do not read the court's opinion to prohibit the plaintiff...from communicating with other potential members of the class." *Id.* at 1217. *Cf. Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989) ("We hold that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs.").

Each of the four appellate decisions of the various circuits, as well the Court in *Bernard*, have analyzed the impact of the restraint on the ongoing litigation. A blanket prohibition on communication without any analysis by the district court violates both the First Amendment and the mandate of the Court in *Bernard*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Robert J. Winicki
(Counsel of Record)
Winicki Law Firm
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955

Barbara Slott Pegg
Barbara Slott Pegg, P.A.
13000 Sawgrass Village Circle
Suite 11
Ponte Vedra Beach, Fl. 32082
(904) 285-8100

Attorneys for Petitioners
Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom and Joann Kotchkowski.